MAY 25 197

MICHAEL RODAK, JR.,

In the Supreme Court of the United States

October Term, 1971

No. 72-_____

CITIZENS ORGANIZED TO PRESERVE OUR ENVIRONMENT, *et al.*,
Petitioners,

vs.

RICHFIELD BOARD OF ZONING APPEALS
and
OHIO SPORTS CENTER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PAUL A. TOBERT
JEROME S. KALUR
JAMISON, ULRICH, BUSKIRK & HESSER
1425 National City Bank Building
Cleveland, Ohio 44114
Counsel for the Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

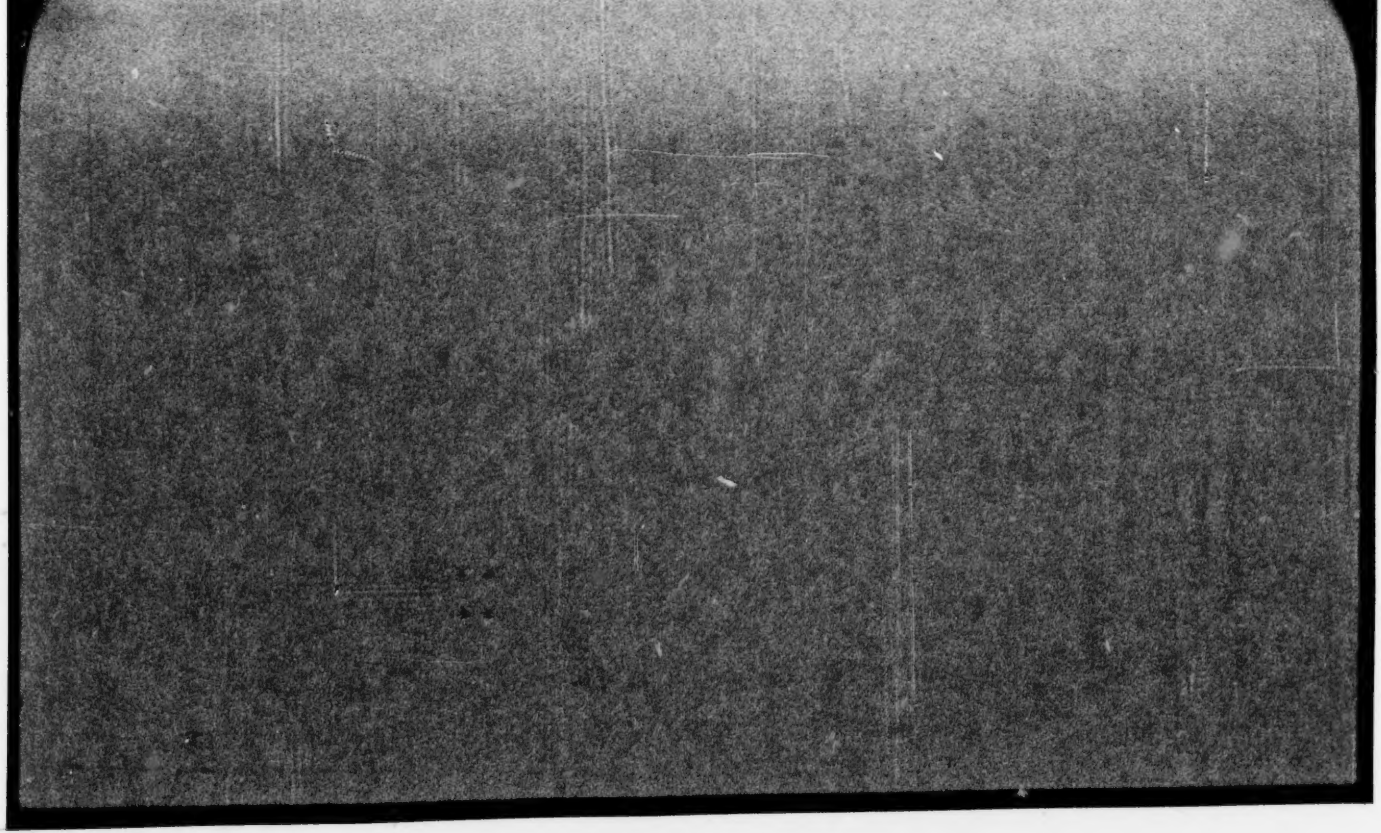

TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
QUESTION PRESENTED 2
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASON FOR GRANTING THE WRIT 4
1. The issuance of a zoning use variance to Ohio Sports Center, Inc., was an action which violated petitioners' right to due process of law since they were not supplied with notice that a use variance would be the subject matter of the hearing 4
CONCLUSION 8
APPENDIX—
Notice of Hearing on Zoning Appeal A1
Opinion of Trial Court A2
Opinion of Ohio Appellate Court A10
Order of Ohio Supreme Court A19

CITATIONS

Cases

Brachfeld v. Sforza, 114 N.Y.S.2d 722 ..... 6, 7
Mullane v. Central Hanover Tru. Co., 339 U.S. 306 5
Spencer v. Bd. of Zoning Appeals, 85 Ohio L. Abs. 361 5

Constitution and Statutes

Constitution of the United States, 14th Amendment 4
Ohio Revised Code:
Section 519.14(A) 3
Section 519.15 ..... 2, 4, 7
28 U.S.C. 1257(3) 2

Miscellaneous

Anderson, 3 AMERICAN LAW OF ZONING 207 6
Rathkopf, 2 THE LAW OF ZONING AND PLANNING 42-1 6

In the Supreme Court of the United States

October Term, 1971

No. 72-.....

CITIZENS ORGANIZED TO PRESERVE
OUR ENVIRONMENT, *et al.*,
Petitioners,

vs.

RICHFIELD BOARD OF ZONING APPEALS
and
OHIO SPORTS CENTER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioners, COPE (a non-profit Ohio corporation), Richard W. Wagner, and Paul C. Davis, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered on March 16, 1972.

OPINIONS BELOW

Unreported opinions were rendered by the Court of Common Pleas of Summit County, Ohio and the Court of Appeals of Summit County. Copies of the opinions are contained in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 16, 1972. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether the zoning appeals hearing provision of §519.15 of the Ohio Revised Code was so applied as to violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

STATUTORY PROVISIONS INVOLVED

§519.15 of the Ohio Revised Code (in pertinent part):

> Appeals to the board of zoning appeals may be taken by any person aggrieved or by any officer of the township affected by any decision of the administrative officer. Such appeal shall be taken within twenty days after the decision by filing, with the officer from whom the appeal is taken and with the board of zoning appeals, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board of zoning appeals all the papers constituting the record upon which the action appealed from was taken.
>
> The board of zoning appeals shall fix a reasonable time for the public hearing of the appeal, give at least ten days' notice in writing to the parties in interest, give notice of such public hearing by one publication in one or more newspapers of general circulation in the county at least ten days before the date

of such hearing and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any person may appear in person or by attorney.

STATEMENT OF THE CASE

This controversy arose as the result of a zoning appeal to the Board of Zoning Appeals of Richfield Township by respondent herein Ohio Sports Center, Inc., an Ohio corporation. Said respondent desires to construct an 18,000 seat sports arena in a semi-rural area between Akron and Cleveland. The petitioners are an Ohio non-profit corporation composed of nearby property owners who oppose construction of the coliseum and the changes in their quality of life which would be caused by the construction of the coliseum in Richfield Township.

By reason of a dispute between the parties as to the proper zoning classification land use (the details of which are not relevant to the subject matter of this Petition) an appeal was carried to the Richfield Board of Zoning Appeals by petitioners the Citizens Organized to Preserve Our Environment (hereinafter COPE) under the following statutory authority (a separate appeal by Ohio Sports Center, Inc., was also taken, but its subject matter has never been at issue):

> The township board of zoning appeals shall have the following powers:
>
> (A) To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25, inclusive, of the Revised Code, or of any resolution adopted pursuant thereto . . .
>
> 519.14(A) of the Ohio Revised Code

More that ten days prior to the hearing of August 23, 1971, the Board of Zoning Appeals had printed in a newspaper of general circulation, a notice of hearing upon the combined appeals (see appendix for copy of notice). The hearing notice was filed in accordance with §519.15 of the Ohio Revised Code. It is the application of the hearing notice provision of the statute that petitioners assert is in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Following the hearing, the Board of Zoning Appeals issued a decision granting a use variance and issuing the appropriate zoning certificates. Appeals of that initial decision were taken to the Common Pleas Court of Summit County, the Court of Appeals of Summit County (see opinion in Appendix) and to the Supreme Court of Ohio. In each instance, petitioners raised the issue of improper notice of the hearing subject matter as being a violation of due process of law. In each instance petitioners' contentions upon the Constitutional issue were rejected.

REASON FOR GRANTING THE WRIT

1. The issuance of a zoning use variance to Ohio Sports Center, Inc., was an action which violated petitioners' right to due process of law since they were not supplied with notice that a use variance would be the subject matter of the hearing.

Section 519.15 of the Ohio Revised Code merely requires that a Board of Zoning Appeals "give notice" of a hearing at least ten days before it is held. The issue that petitioners would put before this court is what constitutes notice of adversary administrative proceeding, i.e., is it

sufficient to merely inform parties that a hearing will be held without reference to the complete subject matter of decision?

In the case at bar, nothing in the notice of hearing in any way indicated that a zoning use variance would be considered by the Board of Zoning Appeals. It has been the contention of the respondents and the courts of Ohio that at zoning hearings, a Board of Zoning Appeals may decide any and all zoning issues without regard to its public notice statements. (See opinion of Court of Appeals and *Spencer v. Bd. of Zoning Appeals,* 85 Ohio L. Abs. 361 (Stark Cty. C.P. 1959), 170 N.E.2d 870.

Those who are noticed are entitled to know what will be ruled upon and to be able to present appropriate witnesses at administrative hearings. The contention that an appeal from a zoning inspector's decision allows the board to rule on all aspects of a proposed land use flies in the face of all accepted concepts of fair *adversary* procedures.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . The notice must be of such nature as reasonably to convey the required information.
>
> *Mullane v. Central Hanover Tru. Co.,* 339 U.S. 306, 314 (1960).

Proper notice means much more than simply informing interested parties that a zoning appeal will be heard. It means that those parties will be adequately informed of the issues and that *only those issues will be decided.*

The board set forth the issues in its notice of hearing and should have confined its decision to those boundaries. Several prominent zoning text writers have discussed this imperative at some length:

> The purpose of the notice requirement is to advise those who may have an interest in and a desire to be heard upon the subject of the proposed administrative action so that they may have the opportunity to present their arguments and objections for consideration by the administrative board . . . A notice of hearing may be defective in relation to the statutory requirements in several ways: it may not correspond with the requirement as to time, it may be so vague as to fail to advise persons interested just what action is to be considered, or the notice may be entirely misleading, giving *an erroneous description of the action to be considered.* (Emphasis added)
>
> Rathkopf, 2 THE LAW OF ZONING AND PLANNING, 42-1 (1962).
>
> . . . it is clear that where notice of hearing is required the notice must inform the party entitled to it of the nature of the application.
>
> Anderson, 3 AMERICAN LAW OF ZONING 207 (1968).

By granting a use variance without notice *upon that issue* and thereby precluding the appellants from presenting witnesses, the board engaged in a distinct and unequivocal violation of the appellants' rights. A similar problem was presented in *Brachfeld v. Sforza,* 114 N.Y.S.2d 722 (1952) where the appeals court stated:

> Changes in zoning ordinances affect property rights, and the provisions as to a notice of hearing must be

strictly complied with. A notice which does not warn of the nature of the proposed amendment is no notice. 114 N.Y.S.2d at 725.

By failing to require adequate notice or to define that term for Boards of Zoning Appeal, § 519.15 of the Ohio Revised Code allows for decisions which violate basic concepts of fair procedure. The Fourteenth Amendment provides that no State shall, "deprive any person of life, liberty, or property, without due process of law." This constitutional mandate has been constantly held to require basic fairness in administrative proceeding. No citation of authority is needed to prove that a board of zoning appeals acquires jurisdiction only by the use of proper and complete notice. Instead of ruling that a coliseum in a C-1 zone is an improper use and that the zoning inspector had erred in not refusing a certificate on that basis (the only *use* issue then before it), the Board of Zoning Appeals chose to act without notice of hearing and issue a use variance. If township zoning boards are to be held to elementary standards of fairness, the board's decision cannot be allowed to stand.

Section 519.15 of the Revised Code establishes the necessity that notice of a zoning appeal board hearing be given at least ten days prior to the holding of same. This case raises the important constitutional question of what type and form of notice is necessary to comport with due process of law when a zoning appeals board is aware that it is faced with a two-party adversary proceeding? The courts of Ohio have contended that in the informal proceedings of an administrative agency, such as a zoning appeal board, only general notice of a hearing need be given. The petitioners, on the other hand, insist that due process of law requires more. They urge that before a board of zoning appeals may acquire jurisdiction to render

a final determination on a zoning use variance, it must serve specific notice that it intends to hold a meeting on that issue so that evidence may be presented by both sides.

Waiting until the appeal hearing to advise the parties that additional zoning topics, other than those previously published or expected, will be decided is not enough to satisfy basic constitutional rights. The lower courts in this case seem to equate the fact that appellants were present at the zoning hearing with full due process of law. But due process involves much more: it is the right to prepare ahead of the hearing; it is the right to have witnesses prepared and in attendance; and it is the right to know before a hearing what issues will be heard and decided. The duty to give proper and complete hearing subject matter notice to potential zoning hearing parties is not a harsh one. The basic requirements of fairness and due process require no less.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio and the opinion of the Summit County Court of Appeals.

Respectfully submitted,

PAUL H. TORBET
JEROME S. KALUR
Counsel for Petitioners